Supreme Court, U.S.
FILED
MAY 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON, GEORGE M. DAVIES, et al.,

Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C., and BANCO NACIONAL DE MEXICO, S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' CONSOLIDATED SUPPLEMENTAL BRIEF

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Preliminary Statement

This consolidated brief is filed in response to Petitioners' Supplemental Brief.

Argument

Petitioners allege that the Supreme Court of Mexico recently ruled in a case not involving petitioners that the Mexican exchange control decrees at issue in this case are invalid under Mexican law.

Even if petitioners' contention were true,[1] however, that would not furnish a reason for this Court to grant the Petition.

The Ninth Circuit's decision in this case was simple and straightforward: (i) that the certificates of deposit issued by the respondent banks are not securities, and (ii) that the Mexican decrees did not involve a taking in violation of international law. Those are the only issues raised in the Petition.[2] It is clear, however, that the Mexican court decision alleged by petitioners did not and could not decide the first issue in this case, *i.e.*, whether a "security" existed under United States federal securities law. As to the second issue raised in the Petition, even if the alleged Mexican decision held that the decrees are invalid under *Mexican law*, such a decision would not go to the question of whether the decrees violated *international law*, which is the basis of petitioners' claim.[3]

Not only is petitioners' reference to an alleged Mexican court decision irrelevant to the issues presented by the Petition, but peti-

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[1] Petitioners did not attach a copy of the alleged opinion to their Supplemental Brief and seek to rely only on an unofficial description of that decision.

[2] Petitioners' suggestion now that they have breach of contract claims is not an issue presented by the Petition. Furthermore, as respondents noted in the Consolidated Brief in Opposition to the Petition (at p. 16 n.10), any such claim would be defeated by the Act of State Doctrine, as all courts that have considered such claims have dismissed the actions based on that Doctrine. Moreover, it is established law that the Act of State Doctrine applies even if it is alleged that the sovereign act at issue violates the internal law of the foreign state. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964); *Pons v. Republic of Cuba*, 294 F.2d 925, 926 (2d Cir. 1961), *cert. denied*, 368 U.S. 960 (1962); Restatement (Second) of Foreign Relations §41, comment f and illustration 11 (1965); Restatement (Revised) of Foreign Relations §469, comment d (Tent. Draft No. 7 April 10, 1986) ("courts in the United States will not entertain challenges to the validity of a taking by a foreign state on the ground that it was contrary to the state's own constitution or laws, or that a law or decree had not been properly enacted").

[3] Petitioners asserted as a cause of action that the decrees violated international law in an attempt to fit within the jurisdictional provisions of 28 U.S.C. §1605(a)(3), which extends to claims of takings of property in violation of international law.

tioners have misled this Court in suggesting that the Mexican decision is a dramatic new development. Even according to the unofficial description relied upon by petitioners, Supplemental Brief at p. 7, the Mexican decision they refer to merely "confirmed the resolution" of the lower court on "procedural items" only. The existence of the Mexican court decision has thus been public knowledge for quite some time.[4] Moreover, at the very beginning of this case petitioners themselves were aware that one Mexican court had ruled the decrees invalid under Mexican law on October 20, 1982. *See* Opposition to Motion to Dismiss, filed April 1985 in all three cases brought against the respondent banks, at p. 15. The existence of these Mexican cases, however, is not relevant to the issue presented by the Petition, nor is it relevant to the decision below, which rested instead on distinct and independent grounds under United States federal securities law and international law.[5]

In sum, the unofficial description of the decision of the Mexican court upon which petitioners seek to rely is irrelevant to the issues raised by the Petition herein and, according to the very material cited by petitioners, is not a new development but merely the confirmation

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[4] Indeed, the respondent banks have suggested that petitioners seek redress in Mexican courts. The availability of redress, which is indicated by the decision raised by petitioners, further demonstrates that the Ninth Circuit was correct in holding that the Mexican legal system affords protections to depositors substantially similar to that afforded to depositors in the United States.

[5] It should also be noted that the Mexican Supreme Court decision referred to by petitioners is not binding in similar cases in Mexican courts, since under Mexican law there must be five consecutive and consistent Supreme Court decisions ruling on a issue before binding precedent is established. *Ley de Amparo* §192.

on "procedural items" of preexisting decisions of other Mexican courts. Petitioners' Supplemental Brief thus fails to present a ground for this Court to grant the Petition.

Respectfully submitted,

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